Filed 8/30/16 P. v. Crews CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY ALAN CREWS, Defendant and Appellant.	A144227 (Contra Costa County Super. Ct. No. 51411735)

Defendant was sentenced to an aggregate term of six years in state prison after a jury found him guilty as charged of five felonies: two counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)); receiving stolen property (Pen. Code, § 496, subd. (a)); vehicle theft (Veh. Code, § 10851.subd. (a)); and evading a peace officer while driving recklessly (Veh. Code, § 2800.2, subd. (a)).

He presents two claims of error, neither of which requires an extensive summary of the evidence received at trial because each is a pure question of law, and because only the conviction for reckless driving is involved. As to this, it is sufficient to note that on the evening of February 1, 2014, defendant was observed driving a vehicle that had been reported stolen. A number of Martinez police officers moved in to stop the vehicle on the city streets, but when red lights and sirens were activated, defendant sped off. Defendant ran a red light and got on a nearby freeway. During the ensuing pursuit, defendant attained a speed of 105 mph, turned off his headlamps, and made numerous lane changes that one of the pursuing officers characterized in his testimony as "unsafe." After a chase of four to five miles, defendant left the freeway. Defendant was apprehended when,

having driven the vehicle over a "spike strip" that punctured three tires, and ignoring a stop sign at an intersection, the vehicle finally came to a halt. Defendant did not testify or present any evidence.

(1)

Defendant's primary contention is that he is the victim of prejudicial instructional error with respect to his conviction for violating Vehicle Code section 2800.2. The jury was instructed with CALCRIM No. 2181 as follows:

"The defendant is charged in Count Three with evading a peace officer with wanton disregard for safety, in violation of Vehicle Code section 2800.2.

"To prove that the defendant is guilty of this crime, the People must prove that: a peace officer driving a motor vehicle was pursuing the defendant; the defendant, who was also driving a motor vehicle, willfully fled from or tried to elude the officer intending to evade the officer; during the pursuit, the defendant drove with willful . . . disregard for the safety of persons or property; and all the following are true: There was at least one lighted red lamp visible from the front of the police officer's vehicle; the defendant either saw or reasonably should have seen the lamp; the peace officer's vehicle was sounding a siren as reasonably necessary; the peace officer's vehicle was distinctively marked; and the peace officer was wearing a distinctive uniform.

"A person employed as a police officer by the City of Martinez is a peace officer.

"Someone commits an act wilfully [*sic*] when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"A person acts with wanton disregard for safety when he or she is aware that his actions present a substantial and unjustifiable risk of harm and he intentionally ignores that risk. The person does not, however, have to intend to cause damage.

"Driving with willful or wanton disregard for the safety of persons or property includes, but is not limited to, causing damage to property while driving or . . . committing three or more violations that are each assigned a traffic violation point. Vehicle Code section 21453, red light; Vehicle Code section 22107, failure to signal;

Vehicle Code section 24250, driving without headlamps during hours of darkness; Vehicle Code section 22350, basic speed; and Vehicle Code section 22450, stop sign; Vehicle Code section 21650, failure to drive on the right side of the roadway, these are all Vehicle Code sections that are violations which are assigned a traffic violation point."

According to our Supreme Court, under Vehicle Code section 2800.1, "a person who operates a motor vehicle 'with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor . . . *if all of the following conditions exist:* [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) *The peace officer's motor vehicle is distinctively marked.* [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . wearing a distinctive uniform.' (Italics added.) Thus, the statute requires four distinct elements, each of which must be present: (1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1007–1008.)

The conduct may become a felony under Vehicle Code section 2800.2 if in addition the defendant operates the motor vehicle "in a willful or wanton disregard for safety of persons or property," which is statutorily defined as including, "but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer *during which time either three or more violations that are assigned a traffic violation point . . . occur, or damage to property occurs*." (Italics added.) The language we have italicized specifies two ways by which operating a motor vehicle "in a willful or wanton disregard for safety of persons or property"—the fifth element required for a felony conviction, may be proved. (See, e.g., *People v. Varela* (2011) 193 Cal.App.4th 1216, 1220; *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–394.)

Defendant's contention is aimed at the final paragraph of CALCRIM No. 2181, specifically the "violations" of the Vehicle Code that "are each assigned a traffic violation point." He does not claim that the instruction fails to identify operating a motor

vehicle "in a willful or wanton disregard for safety of persons or property" as an element of the felony offense. He does not dispute that each of the six Vehicle Code infractions was correctly identified, and that each is assigned a single traffic violation point by Vehicle Code section 12810. (See *People v. Mutuma* (2006) 144 Cal.App.4th 635, 643 ["The statute . . . contemplates that traffic violations involving the operation of a motor vehicle . . . are worth a point unless otherwise stated"].) But he does argue that because CALCRIM No. 2181 does not specify the elements of the particular Vehicle Code violations, the trial court was under a sua sponte obligation to do so.

All of the specified Vehicle Code sections define infractions, the least serious of offenses in the Vehicle Code. The consequences of their violation do not include imprisonment, suspension of the driving privilege, or imposition of a substantial fine, the features of felonies or misdemeanors. (See Pen. Code, §§ 17, subd. (a), 19.6, 19.8, subd. (c); Veh. Code, §§ 40000.1, 42000, 42002.) With some specified exceptions, infractions generally entail a fine of $100 for the first violation, $200 for the second, and $250 for the third. (Veh. Code, §§ 42001, 42001.11–42001.25.) There is no right to jury trial, and generally no right to counsel appointed at public expense. (Pen. Code, § 19.6.) What was true in 1978 is still true: "For the most part, trials of traffic infractions involve no complex problems of law or fact." (*People v. Lucas* (1978) 82 Cal.App.3d 47, 52.) Nevertheless, Vehicle Code infractions *are* criminal offenses (Pen. Code, § 16), and their presence does have the significant penal consequence under Vehicle Code section 2800.2 of elevating a misdemeanor to a felony.

It does seem somewhat grandiose to speak of the elements of an infraction. The Judicial Council has taken differing views with respect to CALCRIM instructions. It apparently differed from defendant when it adopted CALCRIM No. 2181. Concerning the paragraph at issue, the use note advises: "Give the . . . definition of 'driving with willful or wanton disregard' if there is evidence that the defendant committed three or more traffic violations. The court may also, at its discretion, give the . . . sentence that follows this definition, inserting the names of the traffic violations alleged." (CALCRIM No. 2181 (2016) p. 184.) This is precisely what the trial court here did.

On the other hand, there is an instruction for determining a violation of Vehicle Code section 22350 (CALCRIM No. 595). CALCRIM Nos. 590 and 591, dealing with vehicular manslaughter while intoxicated, specifies that one of the elements the prosecution must prove for conviction is "the defendant committed the (misdemeanor[,] / [or] infraction[,] / [or] otherwise lawful act that might cause death) with . . . negligence." And the bench notes for the instructions state that: "The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). . . . The court **must** also give the appropriate instruction on *the elements of the* driving under the influence offense and the *predicate* misdemeanor or *infraction*." (CALCRIM Nos. 590, 591 (2016) pp. 340, 346, italics added.) The same approach was adopted for instructions on operating a motor vehicle while intoxicated. (See *id*., at pp. 119, 125, [use notes for CALCRIM Nos. 2100 & 2101].)

It will be assumed, solely for purposes of this appeal, that the trial court ought to have gone one step beyond CALCRIM No. 2181 and provided the elements of the relevant infractions. (See, e.g., *People v. Cummings* (1993) 4 Cal.4th 1233, 1311 ["The trial court must instruct even without request on . . . . [a]ll of the elements of a charged offense"].) It will be further assumed that the failure to do so amounted to misinstruction on an element of the offense of felony evasion, and thus constituted federal constitutional error. (See, e.g., *Neder v. United States* (1999) 527 U.S. 1, 10 ["omission of an element is subject to harmless-error analysis" of *Chapman v. California* (1967) 386 U.S. 18]; *People v. Flood* (1998) 18 Cal.4th 470, 502–503 ["an instructional error that . . . omits an element of an offense . . . ." "falls within the broad category of trial error subject to *Chapman* review"].)

" 'In deciding whether a trial court's misinstruction on an element of an offense is prejudicial to the defendant, we ask whether it appears " ' "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " ' " (*People v. Wilkins* (2013) 56 Cal.4th 333, 350.) To assist this general inquiry, a number of analytical approaches have been developed.

"[I]nstructional errors that have the effect of removing an element of a crime from the jury's consideration encompasses a broad spectrum of circumstances and may be assessed in the context of the evidence presented and other circumstances of the trial to determine whether the error was prejudicial." (*People v. Flood*, *supra*, 18 Cal.4th 470, 489.) Reviewing courts have drawn "a clear distinction between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect of an element." (*People v. Cummings*, *supra*, 4 Cal.4th 1233, 1315.) Our Supreme Court has repeatedly emphasized that "[t]he critical inquiry . . . is not the *number* of omitted elements but the *nature* of the issues removed from the jury's consideration. Where the effect of the omission can be 'quantitatively assessed' in the context of the entire record . . . , the failure to instruct on one or more elements" can be harmless. (*People v. Mil* (2012) 53 Cal.4th 400, 413–414; cf. *People v. Flood*, *supra*, 18 Cal.4th 470, 507 [refusing to reverse "because of an instructional error concerning a[ ] . . . peripheral element of the offense"].)

One such means of assessment is the state of the evidence. Harmless error can be found where "the omitted element was uncontested and supported by overwhelming evidence" (*Neder v. United States*, *supra*, 527 U.S. 1, 16–17, 18 ["an omitted element is supported by uncontroverted evidence"]) or when the defendant's evidence was "extremely weak" (*People v. Sakarias* (2000) 22 Cal.4th 596, 621) or next to nonexistent. (*Neder v. United States*, *supra*, at p. 19 ["where a defendant did not, and apparently could not, bring forth facts contesting the omitted element"].) According to our Supreme Court: "the error is harmless, that is, if the record contains no substantial evidence supporting a factual theory under which the elements submitted to the jury were proven but the omitted element was not." (*People v. Sakarias*, *supra*, at p. 625.)

Arguments of counsel may also be considered. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 699; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) Additionally, "[o]ne situation in which instructional error removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element." (*People v. Flood*, *supra*, 18 Cal.4th, 470, 504.) Finally, if the evidence is

lopsided and the point conceded by the defense, harmless error has commonly been found. (See, e.g., *People v. Gamache* (2010) 48 Cal.4th 347, 376.)

The sum total of all of these come up harmless.

The jury was not left completely in the dark. It was not just instructed that defendant had acted with "willful or wanton disregard for the safety of persons or property" if he committed "three or more violations that are each assigned a traffic violation point" without identification of those violations. It was not left guessing as it would have been if the trial court just rattled off Vehicle Code sections. As already noted, the trial court followed the use note recommendation by "inserting the names of the traffic violations alleged." Moreover, with one possible exception, the "names" used by the trial court are unusually free of jargon and are more or less immediately comprehensible. When the jury was told that Vehicle Code section 21453 represented "red light" and Vehicle Code section 22450 covered "stop sign," it defies common sense—and credibility—to think the jury was left misadvised that either section dealt with any subject other than what is universally known in California as "running" a "red light" or a "stop sign." The same is true for "Vehicle Code section 22107, failure to signal," "Vehicle Code section 24250, driving without headlamps during hours of darkness," and "Vehicle Code section 21650, failure to drive on the right side of the roadway."

The possible exception is "Vehicle Code section 22350, basic speed." That provision reads: "No person shall drive a vehicle upon a highway at a speed than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." As previously noted, it is the rare infraction covered by a CALCRIM instruction.[1] However, in the context of defendant conceding he was driving

[1] "To prove that the defendant committed a violation of the basic speed law, the People must prove that:

1. The defendant drove a vehicle on a highway; [¶] AND [¶] 2. The defendant drove (faster than a reasonable person would have driven considering the weather,

a motor vehicle on a highway, and the undisputed evidence of his maneuvers on the highway at a speed of up to 105 miles per hour, it is exceptionally unlikely that a jury could be empanelled which would not conclude that defendant had violated the basic speed law.

And defendant did virtually admit that he was guilty of the evading charge. His counsel's argument to the jury was as follows: "The best way to get out of a hole is to stop digging. That's what Mr. Crews should have done . . . . He attempted to evade one police officer because he knew he was in a stolen car, he had stolen property, he panicked, thought he could get away. But once other police started coming to the scene, it was beyond stupid. It was dangerous. He put himself in a dangerous position. He put the officers, he put civilians in danger. . . . [P]olice officers are swarming on him and he's speeding. But he caused that. I mean, that's his problem. . . . I'm not going to blame the police. He initiated that event. [¶] . . . [F]ortunately nothing happened, and I'm not going to ask you to deliberate too long on that particular charge. [¶] What about the stolen vehicle [charge]? Well, probably not too much I can do with that one either. I mean, he was in the car, he had been driving it." "I'm not asking you to come back not guilty on all the counts, but I'm asking you [to] come back not guilty on the burglaries."

And the prosecutor closed by reminding the jury that defense counsel had "acknowledged his client is more than guilty of several of the counts." The jury deliberated for less than an hour, without asking for a read back of testimony or posing a question to the court.

This was not a situation where "instructional error . . . entirely preclude[d] jury consideration of an element" (*People v. Cummings*, *supra*, 4 Cal.4th 1233, 1315) or

---

visibility, traffic, and conditions of the highway/ [or] at a speed that endangered the safety of other people or property). [¶] The speed of travel, alone, does not establish whether a person did or did not violate the basic speed law. When determining whether the defendant violated the basic speed law, consider not only the speed, but also all the surrounding conditions known by the defendant and also what a reasonable person would have considered a safe rate of travel given those conditions. [¶] [The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel and includes a street.]" (CALCRIM No. 595.)

"remov[ed that] element . . . from the jury's consideration" (*People v. Flood, supra,* 18 Cal.4th 470, 489) because the issue of defendant's Vehicle Code infractions were given to the jury, and the crucial issue of whether defendant's driving had endangered the safety of others was left for the jury's determination. (See *People v. Mil, supra,* 53 Cal.4th 400, 413–414; *People v. Flood, supra,* at p. 507.) It was a situation where we can conclude that "defendant did not, and apparently could not, bring forth facts contesting the omitted element." (*Neder v. United States*, *supra,* 527 U.S. 1, 19.) It is also a situation where "[t]he verdict demonstrates that the jury resolved every contested issue in favor of the prosecution," and "*all* of the evidence at trial relevant to the issue in question," namely, whether defendant had driven the stolen vehicle with willful or wanton disregard for the safety of others, we conclude "there is no rational basis upon which the instructional error could have affected the jury's verdict." (*People v. Flood, supra,* 18 Cal.4th 470, 505.) Thus, as we have concluded in similar circumstances, the claimed instructional error would be harmless. (See *People v. Ritchie* (1994) 28 Cal.App.4th 1347, 1360 ["we hold that where defendant makes an informed, strategic decision to concede guilt of an offense, the trial court erroneously omits an element of the offense in its instructions to the jury, . . . the error is not reversible and the conviction should be affirmed"].)

(2)

The trial court credited defendant with 321 days of custody credits and, accepting defense counsel's figure, 185 days of so-called "good time" credits, for a total of 506 days. Defendant does not challenge the number of custody credits, but he does claim he should have been given 135 additional days of "good time" credits as "calculated by the one-for-one formula in Penal Code section 4019, subdivision (f)," for a total of 642 days, although in his reply brief he reduces the figure to 640. The Attorney General replies that

defendant was awarded more credits than statutorily authorized, so it should be reduced by this court to the correct number—481 days.[2]

As shown by the leading treatise, defendant is correct. (Couzens et al., Sentencing California Crimes (The Rutter Group 2015) ¶¶ 15:4 [p. 15-14], 15:6 [pp. 15-21–15-22].) Nothing in *People v. Whitaker* (2015) 238 Cal.App.4th 1354, cited by the Attorney General, is to the contrary. Indeed, in *Whitaker* we find this: "Subdivision (f) of section 4019 provides: 'It is the intent of the Legislature that if all days are earned under this section, *a term of four days will be deemed to have been served for every two days spent in actual custody*.' (Italics added.) The two days of presentence conduct credit authorized by section 4019, subdivision (f) are the sum of the one day of credit authorized by section 4019, subdivision (b) and the one day of credit authorized by section 4019, subdivision (c)." (*People v. Whitaker*, *supra*, at p. 1358.) The plain import is that the four days are comprised of two days actual custody credits and two days conduct credits under subdivisions (b) and (c).

The judgment of conviction is modified to award 320 "good time" credit days under Penal Code section 4019. As so modified, the judgment is affirmed. The clerk of the trial court is directed to prepare an amended abstract reflecting this modification, and to forward a certified copy to the Department of Corrections and Rehabilitation.

---

[2] Although the Attorney General does not bother to explain why we should entertain her argument when there was no appeal by the People, it seems plain she means to invoke the principle that "[c]omputational errors of this kind result in an unauthorized sentence, and are subject to correction by the trial court or the appellate court when presented. (See *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1411.) The correction should be made even if it results in less credit (and hence a longer term in custody) for the defendant. (*People v. Serrato*, [(1973)] 9 Cal.3d [753,] 763.)" (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764; see *People v. Scott* (1994) 9 Cal.4th 331, 354 ["Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing"]; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 2184 ["Where a sentence is unauthorized, the People are permitted to challenge it either by way of their own appeal [citation], *or* on a defendant's appeal"].)

_____
Richman, Acting P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.